SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950.

No. 395.

ALABAMA PUBLIC SERVICE COMMISSION et als.,
Appellants,

vs.

SOUTHERN RAILWAY COMPANY,
Appellee.

Appeal from the United States District Court
for the Middle District of Alabama.

BRIEF FOR THE APPELLANTS.

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Cases Cited.

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OPINION BELOW.

This case is reported below as **Southern Railway Company v. Alabama Public Service Commission et al.**, 91 F. Supp. 980.

JURISDICTION.

The jurisdiction of this Court is based upon 28 U. S. C. 1253 and 2101 (b), providing for direct appeal to the Supreme Court of the United States within sixty days from an order granting or denying an interlocutory or permanent injunction in any case required to be determined by a district court of three judges, this being an appeal from the granting of an injunction by a three-judge district court specially constituted under 28 U. S. C. 2281 and 2284.

QUESTIONS PRESENTED.

A special three-judge district court was constituted under 28 U. S. C. 2281 and 2284, which sections relate to injunctions against enforcement of state statutes or orders of state administrative agencies alleged to be unconstitutional.

1. Should such court enjoin enforcement of criminal laws of a state where admittedly there have been no threats of multiple prosecutions or of any prosecutions at all?

2. Should such court withhold equitable relief on the ground that plaintiff is not threatened with irreparable injury where he has an adequate remedy in the state courts?

3. Does such court have jurisdiction where plaintiff makes only a colorable attack on the constitutionality of a statute and only attacks the constitutionality of an order which has effected no change in the situation created by the statute?

4. Should such court abstain from exercising jurisdiction where to exercise it will be to interfere with a local policy expressed in the order objected to and not yet ruled on by the courts of the state?

5. Should such court abstain from exercising its jurisdiction to await an authoritative interpretation of state statutes where an administrative order is alleged to be in violation of an entire title of the state code?

6. Should such court abstain from exercising its jurisdiction pending state action which may make unnecessary a decision on constitutional issues where an order is alleged to be in violation of the state constitution?

STATUTES INVOLVED.

The statutes involved are printed in Appendix A to the brief in No. 146 and for brevity are not repeated in this brief.

STATEMENT OF THE CASE.

This is a companion case to No. 146, involving the same parties and having facts in many respects similar, but also differing in certain important details. This case involves trains Nos. 7 and 8, operating between Sheffield, Alabama, and Chattanooga, Tennessee, as a part of Southern's Railway system. Insofar as the trains operate within the State of Alabama they are under the jurisdiction of the Alabama Public Service Commission.

In September, 1948, Southern petitioned the Commission to allow it to abandon the operation of trains 7 and 8 (R. pp. 8-13) pursuant to the requirements of Title 48, Secs. 35 and 106, Code of Alabama 1940, which require that no transportation company shall abandon any of its service to the public unless it first shall have filed an application for a permit to abandon service and shall have obtained from the Commission a permit allowing such abandonment. After two continuances a hearing was had on October 6, 1949, and on April 3, 1950, the Commission entered an order denying the application for authority to abandon, the order resting in large part on the failure of Southern to convince the Commission that it was sufficiently managed and practicing economies and failure to show that it was willing to take affirmative steps to try to put trains 7 and 8 on a paying basis (R. 27-39).

Southern did not ask for a rehearing under Title 48, Sec. 76, Code of Alabama 1940, nor did it take an appeal from the Commission's order, even though Title 48, Sec. 79,

allowed it. Instead Southern filed its complaint (R. pp. 1-17) in the United States District Court for the Middle District of Alabama, basing jurisdiction upon alleged federal questions involved and upon diversity of citizenship and asked for convocation of a District Court of three judges and a hearing under the provisions of 28 U. S. C. 2284. Southern alleged that the Commission's order deprived it of its property without due process, that it was being denied equal protection of the law, that interstate commerce was being burdened and that the order was unjust and confiscatory. It was also alleged that Southern had exhausted its administrative remedies.

Paragraph IV of the complaint (R. pp. 2-3) contained a colorable attack on the constitutionality of Title 48, Sections 35 and 106, Code of Alabama 1940, the railroad frankly stating that it was making such allegations for the purpose, and only for the purpose, of avoiding an admission of record that the statutes were unconstitutional, and also stating, "the plaintiff does not ask in this suit for an adjudication of the constitutionality of said statutes as that is a matter primarily for the Supreme Court of Alabama." At the trial, as in the pleadings, Southern's only real attack on constitutional grounds was directed at the Commission's order of April 3, 1950.

Appellants first filed with Honorable Charles B. Kennamer, Judge of the United States District Court for the Middle District of Alabama, a motion directed to him individually asking that he stay the calling of a three-judge court (R. pp. 19-20). No formal order was issued by Judge Kennamer (this motion was ruled upon by the three-judge court after it convened, along with other motions). Appellants filed a motion to dismiss (R. p. 21), a motion to stay (R. pp. 39-41), and an answer (R. pp. 24-39). After oral argument before the three judges all of appellants' motions were overruled and denied and evi-

dence was then taken and the case submitted on the prayer for permanent injunction. Thereafter the Court issued its final judgment and decree (R. pp. 45-72), overruling all of appellants' motions, declaring the order of April 3, 1950, to be null and void, and enjoining the appellants, their successors in office and their agents, servants and attorneys, from taking any steps or proceedings of any nature whatsoever against Southern to enforce the order of April 3, 1950, or to enforce any fine, forfeiture or other sanctions provided by Title 48, Code of Alabama 1940, or any remedies against plaintiff, its officers, agents or employees on account of the failure to observe the provisions and requirements of the order by abandoning and discontinuing the operation of trains 7 and 8 so far as operated in the State of Alabama.

It is important to note that in case 146 the two trains involved were out of operation and the railroad refused to put them back in operation in the face of an order of the Commission to do so, while in this case the trains were in operation at the time the suit was filed and continued in operation until the temporary restraining order was issued. In case 146 there had been an actual violation of the criminal laws of Alabama and the Commission had called the attention of the railroad to one of the statutory penalties for such violation, while in case 395 there was no violation of the criminal law nor did the Commission even go so far as to call the railroad's attention to what the criminal provisions were. Also in case 146 the purported attack on the constitutionality of the Alabama statutes, while colorable, was not as openly so as in this case, where Southern acknowledged that such allegations were made only to avoid an admission of record.

SPECIFICATION OF ERRORS.

The District Court of the United States for the Middle District of Alabama, Northern Division (single judge), erred:

1. In failing and refusing to grant defendants' motion to stay the call of a three-judge federal court, which motion was filed on, to-wit, the 15th day of May, 1950, and overruled and denied by the three-judge court on July 20, 1950.

The three-judge District Court of the United States for the Middle District of Alabama, Northern Division, erred:

1. In overruling and denying the motion of the defendants to dismiss the action, which motion was overruled and denied on July 20, 1950.

2. In overruling and denying the motion of the defendants to stay the action pending determination in the courts of the State of Alabama of the appeals which might be taken by the plaintiff from the orders or decrees of the Alabama Public Service Commission complained of in the complaint, which motion was overruled and denied on July 20, 1950.

3. In rendering the final decree rendered on July 20, 1950.

4. In assuming jurisdiction of this cause.

5. In exercising jurisdiction of this cause.

6. In proceeding with the hearing of this cause prior to the determination in the courts of the State of Alabama of the appeals which might be taken by the plaintiff from the order or decree of the Alabama Public Service Commission complained of in the complaint.

7. In vacating and declaring null and void and of no effect the order of the defendant Alabama Public Service Commission dated April 3, 1950.

8. In assuming jurisdiction to enjoin enforcement of the criminal law of the State of Alabama.

9. In decreeing that a permanent injunction be issued enjoining the defendants and each of them, and their successors in office and their agents and attorneys, from taking any steps or proceedings of any nature whatsoever against the plaintiff, its officers, agents or employees, to enforce the provisions of the order of the Alabama Public Service Commission dated April 3, 1950, denying plaintiff authority to abandon certain train service, or to enforce any penalties, fines, forfeitures or other sanctions provided by Title 48, Code of Alabama 1940, or any remedies against the plaintiff, its officers, agents or employees, on account of the failure to observe the provisions and requirements of said order by abandoning and discontinuing operation of certain passenger trains between Tuscumbia, Alabama, and Chattanooga, Tennessee, insofar as they are operated within the State of Alabama.

ARGUMENT.

Since this case is in many respects similar to its companion, No. 146, argument will be set out only on points where it is necessary to supplement or distinguish what has been said in the brief on No. 146.

I.

A Federal Court Should Decline to Enjoin Enforcement of the Criminal Law of the State of Alabama.

Because of the difference in facts between this case and No. 146, i. e., that Southern kept its trains running in this case, there had been no violation of Alabama law at the time the suit was filed and the District Court itself acknowledged that the threat of multiplicity of prosecutions was not the ground on which it gave relief (R. p. 53). The Court found "tenuous" appellants' contention that the injunction would restrain enforcement of the criminal laws of Alabama in an unwarranted manner, on the theory that it could assume that if it declined to interfere with the enforcement of the criminal laws Southern would continue to operate its trains (R. p. 53). This is a surprising presumption in view of Southern's previous flagrant disregard of the law in No. 146.

II.

There Was No Jurisdiction in Any Federal Court of Equity, There Being No Irreparable Damage Because Southern Had an Adequate Remedy in State Courts.

The injunction was based on the theory of irreparable damage in the form of operational losses (R. p. 55). It is

basic law that equity should withhold relief where there is no irreparable damage, and it is submitted that no party can be irreparably damaged where he has a speedy and effective remedy in state courts. Southern could have requested a rehearing (Title 48, Section 76, Code of Alabama 1940) but did not, or could have appealed to the Circuit Court of Montgomery County (Title 48, Sec. 79). See **Natural Gas Pipe Line Co. v. Slattery**, 302 U. S. 300, 58 S. Ct. 199 (1937), where plaintiff company, which had been directed by the Illinois Commerce Commission to furnish certain statistical data, was held not to be entitled to equitable relief from a federal court because it could have applied for a hearing from the Commission to ascertain whether the order was "improper, unreasonable or contrary to law," under an Illinois statute authorizing the Commission to "rescind or amend any * * * order or decision made by it." After such petition and upon such hearing the Commission could have modified its order or postponed the effective date thereof. Since large statutory penalties were involved it was held that refusal of postponement of the effective date would have been the occasion for recourse to the courts, but that since plaintiff had not asked for such postponement he had stated no case for equitable relief. The provision of the Alabama Code relating to application for rehearing before the Commission is the substantial equivalent of the Illinois statute, for on such rehearing the Commission could alter, amend, rescind, revoke, postpone or take whatever action to which petitioner could show himself justly entitled. But Southern never asked for this.

In **Burford v. Sun Oil Company**, 319 U. S. 315, 63 S. Ct. 1098 (1943), Mr. Justice Black pointed out in Footnote 29, "Equity relief may be withheld where the state remedy is adequate. **Atlas Life Ins. Co. v. W. I. Southern, Inc.**, 306 U. S. 563, 59 S. Ct. 657." In the **Atlas** case the beneficiary on an insurance policy sued in state court on the policy;

the next day the insurance company sued in equity in federal district court seeking cancellation of the policy on the ground of fraud. The District Court sustained a motion to dismiss on the ground that the insurance company had an adequate remedy at law by setting up fraud as a defense to the action pending in state court (306 U. S. at 570, 59 S. Ct. at 661):

> "Ordinarily when the defense of fraud may be interposed to an action of law on the policy and such an action is imminent or pending, there is no occasion for equitable relief and the parties will be left to their rights as determined in the suit at law. In such a case the bill is dismissed without prejudice, **not because there is a want of jurisdiction in the federal court, but because the plaintiff has made no case for equitable relief.** Phoenix Mut. L. Ins. Co. v. Bailey, 13 Wall. 616, 20 L. Ed. 501; Cable v. United States Life Insurance Co., 191 U. S. 288, 24 S. Ct. 74, 48 L. Ed. 188; Enelow v. New York Life Insurance Co., supra; Di Giovanni v. Camden Insurance Assn., supra. And since the issue is not one of jurisdiction but of the need and propriety of equitable relief, the mere fact that the suit at law which is imminent can be brought only in the state court, or that it is pending there, is immaterial. Cable v. United States Life Insurance Co., supra; Di Giovanni v. Camden Insurance Assn., supra; cf. Phoenix Mut. L. Insurance Co. v. Bailey, supra. It is no ground for equitable relief that the suit at law is brought in a state rather than a federal court, for the insurance company's defense may be protected there as well as in a federal court, and in that case there is no threat of irreparable injury." (Emphasis supplied.)

Southern had a remedy both speedy and adequate in the Alabama courts (see full discussion of method and scope

of appeal in No. 146 brief). And if any actions had been brought against the railroad for violating the statutes or orders, it could have set up as a defense all the matter brought out in this case.

III.

The Three-Judge Federal District Court Had No Jurisdiction of This Cause.

The failure to meet jurisdictional requirements of 28 U. S. C. 2281 is even clearer in this case than in No. 146. The injunction was not sought on the ground of the unconstitutionality of a **statute**. The attack on Title 48, Secs. 35 and 106, is wholly colorable, and Southern frankly stated that it did not ask for adjudication of constitutionality of the statutes (R. p. 2):

> "Plaintiff is advised and believes, and therefore alleges, for the purpose and only for the purpose of avoiding an admission of record that the statutes are unconstitutional and void as an unlawful delegation of legislative power, but the plaintiff does not ask in this suit for an adjudication of the constitutionality of said statutes as that is a matter primarily for the Supreme Court of Alabama."

The prayer for relief (R. pp. 7-8) includes statutes in the requested cloak of protection for it refers to "any penalties or other remedies provided under the laws of the State of Alabama," but the statutes included neither are identified nor is their constitutionality attacked.

As to any **order**, the prayer for relief and the relief granted went far beyond the outer limits of the language "such statute" (or "such order").

Also it is apparent that Southern objects not to the order but to the statutes, which admittedly are properly ruled on by the Supreme Court of Alabama. The order merely denied relief, changed nothing, for the trains were running in compliance with the statute before it was issued and were running in compliance with the statute after it was issued. The "negative order" doctrine of **Standard Oil Co. v. U. S.**, 283 U. S. 235, 51 S. Ct. 429 (1931), and **Piedmont & Northern Railway v. U. S.**, 280 U. S. 469, 50 S. Ct. 192 (1930), has been carved away somewhat, though to what extent is not clear.

See: **U. S. v. I. C. C.**, 337 U. S. 426, 69 S. Ct. 1410 (1949);
Cf: **Ashland Coal & Ice Co. v. U. S.**, 325 U. S. 840, 65 S. Ct. 1573 (1945).

But more than a negative order is involved here where the attack on the order is the nominal basis for three-judge jurisdiction on constitutional grounds with relief being sought from a statute whose constitutionality is admittedly a matter for state court decision. Southern seeks to create a new field for federal jurisdiction under Sec. 2281 by using allegations of unconstitutionality of an order as a springboard to get into court while seeking relief from a constitutional statute and from any and all forms of redress to which it might be subject whenever it wishes to violate the laws of the state.

IV.

The Federal Court Should Abstain From Exercising Jurisdiction of Matters Properly Decided by State Courts.

The District Court specifically found that the doctrine of discretionary abstention or comity did not apply, on the theory that there were no novel, ambiguous or undecided

questions of state law involved (R. p. 51). It is submitted that this is erroneous for several reasons. It overlooks the plain import of **Railroad Commission v. Pullman Co.**, 312 U. S. 496, 61 S. Ct. 643 (1941); **Burford v. Sun Oil Co.**, 319 U. S. 315, 63 S. Ct. 1098 (1943); **Railroad Commission v. Rowan & Nichols Oil Co.**, 311 U. S. 570, 61 S. Ct. 343 (1941); and **Stainback v. Mo Hok Ke Lok Po**, 336 U. S. 368, 69 S. Ct. 606 (1949); that irrespective of novel or undecided questions of law a federal court will decline to interfere in the field of shaping local administrative policy on matters requiring constant adjudgment in terms of local problems.

Further, there actually were undecided matters of local law of very real import and they were strenuously urged in oral argument and in briefs. As one of the strong criteria in deciding questions of public convenience and necessity the Alabama Commission has adopted the recommendation of the Interstate Commerce Commission in its annual report to Congress in 1948 (R. p. 36), calling on the railroads to seek new devices, new methods and improvements. On this question the Commission found as follows (R. p. 37):

> "In regard to economies, we firmly feel that in this case the petitioner has made no attempt to explore the possibilities of a more economic operation but has steadfastly maintained an expensive operating level. This is indicated by the fact that it discontinued the use of a light Diesel unit which unquestionably was rendering adequate and attractive service and substituted a much heavier and expensive steam operation and the fact that with the exception of the six light Diesel units previously mentioned and purchased in 1939, it has not made nor does it appear that it intends to make any experiments with low cost passenger train equipment."

And as follows (R. p. 35):

> "Regardless of frequent shopping we are convinced that had this light Diesel equipment been retained on this line, the operating expenses here shown for the type of equipment now used would be substantially less, not only in mechanical operating costs but also in wages, despite the fact that no costs are shown in the record during the time Diesel power was used. In fact we are inclined to the opinion that this change was a forethought toward ultimate discontinuance of trains 7 and 8."

And ruled as follows (R. p. 38):

> "In dealing with the matter of an economic operation it is not our purpose to attempt to dictate the managerial policy of the railroad but to point out that such matters could and should be thoroughly and carefully investigated before the public is deprived of a needed service and the 'bold experiments' if necessary should be invoked. In this case, as we have stated, no such attempt has apparently been made. Therefore, the public and the Commission is entitled to know whether or not a service can be made to bear its costs or to yield a profit before it should be summarily discontinued. Until such a showing is made by petitioner that it has found experimentation with other devices or other available avenues of economy are ineffectual, we will view with reluctance a request to abandon a service meeting a public need."

The Supreme Court of Alabama previously had given impetus to this line of thought by its decision in **Alabama Public Service Commission v. Atlantic Coast Line R. Co.**, 45 So. 2d 449 (1950), where it had been said (45 So. 2d, at 452-453):

> "But after making such allowance there would be a large increase of operating expense in 1947 over

1946 (approximately $17,000.00). This is said to be the result of post-war inflation. But it is hard to explain such a difference between 1946 and 1947 expense, since they were both probably subject to the same post-war inflation. **No effort is shown to reduce such expense by observing economies,** as in Mississippi Railroad Comm. v. Mobile & Ohio R. R. Co., 244 U. S. 388, 37 S. Ct. 602, 61 L. Ed. 1216." (Emphasis supplied.)

A hazy and shifting line exists between the function of management and of regulation—how far can the Commission go in requiring a carrier to come forward and show that a branch line not only is not but cannot produce its fair share of revenue, by requiring affirmative showing of efficiency of management, observation of economies, attempts to use available new equipment, and "bold experimentation with new devices and methods." It is significant that Southern did not put either before the Commission or the District Court the statistical data showing the result of several years of operation of lightweight modern Diesel equipment on the same Sheffield-Chattanooga run. The Commission in this case has struck out at the railroad's negative approach to branch line operation. Is this Commission policy lawful within the framework of public convenience and necessity as defined by Alabama courts? We do not know; no Alabama case has yet ruled on it. Can the Commission deny authority to discontinue solely on the basis of failure to meet its standards in this regard irrespective of the size of past losses? We do not know. If these criteria cannot be conclusive, to how much weight are they entitled, if any at all? We do not know. If the Supreme Court of Alabama subsequently should find them conclusive, will the federal determination of this case stand or must Southern put its trains back on? We do not know.

In addition, Southern itself squarely raised problems of interpretation of local law by its averment that the order is in the teeth of the policy requiring efficient and economical management by plaintiff and other railroad companies of their property as expressed in the Interstate Commerce Act and **Title 48 of the Alabama Code** and that the order is in "**violation of the Constitution of the State of Alabama**" (R. p. 7). Is it not the rule of this Court to allow the Alabama Supreme Court to rule first on the question of whether the order violates the "policy" of Title 48 of the Alabama Code embracing 475 sections and more than 200 pages?

Shipman v. Du Pre, 339 U. S. 321, 70 S. Ct. 640 (1950);
Watson v. Buck, 313 U. S. 387, 61 S. Ct. 962 (1941);
Railroad Commission v. Pullman Co., 312 U. S. 496, 61 S. Ct. 643 (1941);
Chicago v. Fieldcrest Dairies, 316 U. S. 168, 62 S. Ct. 986 (1942);
A. F. L. v. Watson, 327 U. S. 582, 66 S. Ct. 761 (1946);

and whether the Constitution of Alabama has been violated. In either case a decision on federal constitutional grounds may be avoided.

A. F. L. v. Watson, supra;
Spector Motor Service v. McLaughlin, 323 U. S. 101, 65 S. Ct. 152 (1944);
Chicago v. Fieldcrest Dairies, supra;
Railroad Commission v. Pullman Co., supra.

CONCLUSION.

It is respectfully submitted that the decree of the District Court should be reversed and the cause ordered dismissed, or that the decree be reversed and the cause ordered stayed in the District Court pending adjudication

in state courts of the issues of constitutionality and statutory interpretation which are involved.

Respectfully submitted,

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I certify that a copy of this brief has this day been served upon Marion Rushton, Esq., of Counsel for Appellee, this the ..... day of January, 1951.

.....

Of Counsel for Appellants.